APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED MARCH 19, 2001

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 00-50485

SOUTHWESTERN BELL TELEPHONE COMPANY,

Plaintiff-Appellee,

VERSUS

CITY OF EL PASO, et al.,

Defendants,

and

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
El Paso Division

Before DUHÉ and PARKER, Circuit Judges, and LINDSAY,* District Judge.

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* District Judge of the Northern District of Texas, sitting by designation.

Appendix A

ROBERT M. PARKER, Circuit Judge:

Appellant El Paso County Water Improvement District No. 1 appeals the district court's denial of its motion to dismiss on Eleventh Amendment grounds. Because we conclude that the district court applied the proper legal standard in reviewing Appellant's motion, we AFFIRM.

I.

Appellant is a water improvement district created pursuant to Article XVI, Section 59, of the Texas Constitution. Appellant owns a series of irrigation ditches deeded from the United States Bureau of Reclamation to Appellant in January 1996. Development in the area of the ditches has resulted in the development of roads crossing the ditches and in an increase in the demand for telephone service, which is provided by installing telephone lines along such roads. Appellant has established certain application procedures for entities wanting to cross the canals, laterals, and ditches-rights-of-way owned by Appellant. Such procedures require an entity to complete an application, pay an application fee, and obtain a survey. The application must be preliminarily approved by Appellant's Board of Directors, which, upon completion of the survey, assesses a payment against the entity based on the length of the crossing.

Appellee, a telecommunications services provider, brought this action seeking declaratory and injunctive relief against the City of El Paso and Appellant for their alleged violation of the federal Telecommunications Act of 1996 ("FTA"), the Texas Public Utilities Regulation Act ("PURA"),

and other state law. Appellee and the City of El Paso have settled their claims. Appellee's claims against Appellant allege, *inter alia*, that under the FTA and PURA, Appellant cannot demand payment and a detailed application from Appellee for laying telephone lines that cross Appellant's rights-of-way.

In response, Appellant counterclaimed against Appellee for trespass and/or taking property for public use without compensation; more importantly, Appellant moved to dismiss Appellee's claims under the Eleventh Amendment, arguing that it was an arm of the State of Texas and thus Appellee's claims were barred by the Eleventh Amendment. The district court, applying our "arm-of-the-state" analysis noted in *Clark v. Tarrant County*, 798 F.2d 736, 744-45 (5th Cir. 1986), held that Appellant was not an arm of the State of Texas, and thus was not entitled to Eleventh Amendment immunity.

II.

We review the district court's order denying a motion to dismiss on Eleventh Amendment grounds as an appealable collateral order based on an issue of law, *see Champagne v. Jefferson Parish Sheriff's Office*, 188 F.3d 312, 313 (5th Cir. 1999) (per curiam), and we review the district court's conclusions of law *de novo*. *Id.*

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity,

> commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI. "[T]he reference to actions 'against one of the United States' encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities." *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997). However, the Eleventh Amendment bar to suit in federal courts only extends to states, state officials, and state instrumentalities in appropriate circumstances, and does not extend to counties, similar municipal corporations, and other political subdivisions, even though such entities enjoy a "slice of state power." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 400-01 (1979); *Mt. Healthy City Bd. of Education v. Doyle*, 429 U.S. 274, 280 (1977); *Moor v. Alameda County*, 411 U.S. 693, 717-21 (1973); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890).

When determining whether a state agency or instrumentality may invoke the state's immunity as an arm of the state, courts must review the relationship between the state and the entity in question, examining the essential nature of the proceeding, the nature of the entity created by state law, and whether a money judgment against the instrumentality would be enforceable against the state. *Doe*, 519 U.S. at 429-30 (citing *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 576 (1946); *Mt. Healthy City*, 429 U.S. at 280; *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 45-51 (1994)).

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We have stated that this arm-of-the-state analysis requires the examination of "the powers, characteristics and relationships created by state law in order to determine whether [a] suit is in reality against the state itself." *Hander v. San Jacinto Junior College*, 519 F.2d 273, 279 (5th Cir. 1975) (citing *Aerojet-General Corp. v. Askew*, 453 F.2d 819 (5th Cir. 1971), *cert. denied*, 409 U.S. 892 (1972)); *see also Laje v. R.E. Thomason Gen. Hosp.*, 665 F.2d 724, 727 (5th Cir. 1982); *United Carolina Bank v. Board of Regents*, 665 F.2d 553, 557 (5th Cir. Unit A 1982); *Jagnandan v. Giles*, 538 F.2d 1166, 1173-74 (5th Cir. 1976), *cert. denied*, 432 U.S. 910 (1977). In conducting such analysis, we have held that "comparisons [between like entities] cannot substitute for a careful examination of the particular entity at issue." *McDonald v. Board of Miss. Levee Comm'rs*, 832 F.2d 901, 908 (5th Cir. 1987); *see also Hudson v. City of New Orleans*, 174 F.3d 677, 681 (5th Cir.), *cert. denied sub nom. Connick v. Hudson*, 528 U.S. 1004 (1999); *Flores v. Cameron County*, 92 F.3d 258, 268 (5th Cir. 1996).

We have refined the arm-of-the-state analysis to require examination of a variety of factors concerning the particular entity in question. *See Clark v. Tarrant County*, 798 F.2d 736, 744-45 (5th Cir. 1986). These factors include (1) whether the state statutes and case law view the entity as an arm of the state; (2) the source of the entity's funding; (3) the entity's degree of local autonomy; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has the authority to sue and be sued in its own name; and (6) whether it has the right to hold and use property. *Id.* These factors are examined as a whole, and no single factor is dispositive. *Id.* at 745; *see also United*

Carolina Bank, 665 F.2d at 557. However, the second factor, the source of the entity's funding, is "of considerable importance." *Doe*, 519 U.S. at 904; *Jacintoport v. Greater Baton Rouge Port Comm'n*, 762 F.2d 435, 440-41 (5th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986); *Laje*, 665 F.2d at 727.

Appellant argues that the district court erred by applying the arm-of-the-state analysis established in *Clark* because our prior decisions hold Appellant as an arm of the state entitled to Eleventh Amendment immunity. Specifically, Appellant argues that our decision in *Ysleta Del Sur Pueblo v. El Paso County Water Improvement Dist.*, 222 F.3d 208 (5th Cir.), *cert. denied*, 121 S. Ct. 177 (2000), which affirmed the district court's finding of Eleventh Amendment immunity for Appellant, controls this action. Appellant also argues that our prior decisions in *Kamani v. Port of Houston Authority*, 702 F.2d 612 (5th Cir. 1983), and *Pillsbury Co. v. Port of Corpus Christi Authority*, 66 F.3d 103 (5th Cir. 1995), *cert. denied*, 517 U.S. 1203 (1996), held that the entities at issue in those cases were entitled to Eleventh Amendment immunity by virtue of their creation pursuant to Article XVI, Section 59, of the Texas Constitution. Because Appellant is also created under Article XVI, Section 59, Appellant argues that it is likewise entitled to immunity.

We disagree with both arguments. First, *Ysleta* is not controlling because it conflicts with our prior decisions requiring a careful examination of the nature of an entity claiming immunity. Although *Ysleta* affirmed the district court's holding that Appellant was an arm of the state entitled to immunity, it stated no reasons for the decision except to

say that the plaintiff's arguments in that appeal "lack[ed] merit." *Ysleta*, 222 F.3d at 208. In support of this conclusion, *Ysleta* cited *Kamani* and *Pillsbury* without further explanation. *Kamani* was an admiralty action in which the court stated without analysis that the Port of Houston Authority was "a 'creature of state law and a political subdivision of the State of Texas' " entitled to Eleventh Amendment immunity. *Kamani*, 702 F.2d at 613. *Pillsbury* was a breach-of-contract action in which the court held that the Port of Corpus Christi Authority was factually and legally indistinguishable from the Port of Houston Authority, and was thus entitled to immunity under *Kamani*. *Pillsbury*, 66 F.3d at 104.

Ysleta's conflict with prior decisions establishing the arm-of-the-state analysis originates with *Kamani*. Notwithstanding the arm-of-the-state analysis established by decisions such as *Hander*, *Jagnandan*, *United Carolina Bank*, and *Laje*, *Kamani* relied on *McCrea v. Harris County Houston Ship Channel Navigation Dist.*, 423 F.2d 605, 607 (5th Cir.), *cert. denied*, 400 U.S. 927 (1970), in concluding that the Port of Houston Authority was entitled to immunity. However, *McCrea* involved a wrongful death action under the Federal Employers' Liability Act that did not involve the Eleventh Amendment at all. In *McCrea*, the court simply observed that the Port of Houston Authority "is a creature of state law and a political subdivision of the State of Texas operating terminal facilities at the Port of Houston" in concluding that the port was not a "rail carrier" under the FELA. *McCrea*, 423 F.2d at 607. While *McCrea* did examine the port's organizational and operational characteristics, such examination is different from the arm-of-the-state analysis

required to determine whether an entity is entitled to Eleventh Amendment immunity. *See Jacintoport*, 762 F.2d at 440 ("It would be inconsistent with this Circuit's test for determining [Eleventh Amendment] immunity to rely on *Miller* [*v. Greater Baton Rouge Port Comm'n*, 74 So.2d 387 (La. 1954)], because immunity of the [entity at issue] was never an issue in that case."). In light of our decisions requiring the application of the arm-of-the-state analysis, *Kamani*'s quotation of *McCrea*'s statement that the Port of Houston is a "creature of state law and a political subdivision of the State of Texas" does not automatically support the conclusion that the Port of Houston Authority is entitled to Eleventh Amendment immunity. An entity is not an arm of the state for Eleventh Amendment purposes simply because it is a creature of state law and a political subdivision of a state. Such conclusion would entirely obviate the arm-of-the-state analysis because every entity claiming Eleventh Amendment immunity is a "creature" of some state law. Moreover, political subdivisions of states are generally *not* entitled to Eleventh Amendment immunity. *See Lake Country Estates*, 440 U.S. at 401; *Lincoln County*, 133 U.S. at 530-31. *Kamani*'s conclusion that the Port of Houston Authority was entitled to immunity by virtue of its status as a creature of state law and a political subdivision of Texas conflicts with the line of precedent beginning with at least *Hander*, *Jagnandan*, *United Carolina Bank*, and *Laje*.

Pillsbury continued the conflict by applying *Kamani* to hold that the Port of Corpus Christi Authority was entitled to Eleventh Amendment immunity. This result is not surprising because the Port of Corpus Christi Authority was held to be factually and legally indistinguishable from the

Port of Houston Authority in *Kamani*. While *Pillsbury* noted that a proper arm-of-the-state analysis would result in the same conclusion, the conflict created by *Kamani* was not addressed. In addition, the court suggested in dicta that its decision was controlled by *Kamani* because both ports were created pursuant to Article XVI, Section 59.

Ysleta thus rests on holdings that conflict with our prior decisions requiring an arm-of-the-state analysis for entities claiming Eleventh Amendment immunity, and the district court did not err when it applied *Clark*'s six-factor analysis. When two holdings or lines of precedent conflict, the earlier holding or line of precedent controls. *Billiot v. Puckett*, 135 F.3d 311, 316 (5th Cir.), *cert. denied sub nom. Billiot v. Anderson*, 525 U.S. 966 (1998). In this action, although *Kamani* was decided before *Clark*, *Clark*'s arm-of-the-state analysis is a consistent part of a line of precedent including at least *Hander*, *Jagnandan*, *United Carolina Bank*, and *Laje*, which were all decided before *Kamani*. Therefore, the district court properly applied *Clark* in denying Appellant's Eleventh Amendment argument. Moreover, even though *Ysleta* was decided before the district court issued its decision, it was published after that decision and thus was not precedent for the district court. *See* FIFTH CIR. R. 47.5.4.

We also reject Appellant's second argument that it is entitled to Eleventh Amendment immunity by virtue of its creation pursuant to Article XVI, Section 59. Even if *Kamani* and *Pillsbury* applied the proper arm-of-the-state analysis, they do not state that an entity is entitled to Eleventh Amendment immunity simply because they are created under a particular state law. While *Pillsbury* noted that both ports

were created pursuant to Article XVI, Section 59, there is no suggestion in that decision that the particular law under which an entity is created is the sole factor in determining the issue of immunity. Our decisions clearly forbid such a result. *See, e.g.*, *Jacintoport*, 762 F.2d at 439-40. Moreover, even though *Ysleta* affirmed the district court's conclusion that we established a "bright-line test" for determining whether an entity created pursuant to Article XVI, Section 59, is entitled to immunity, such a test is contrary to our decisions requiring the application of the arm-of-the-state analysis and to the principle that comparisons or analogies between like entities cannot substitute for a proper analysis of the particular entity claiming immunity. *See, e.g.*, *McDonald*, 832 F.2d at 908. Indeed, such a test is no test at all.

Finally, because Appellant does not challenge the district court's application of the individual factors of the arm-of-the-state analysis, we will not address such application. While Appellant argues in its reply brief that Appellee's defense of the district court's application of the factors is "fundamentally flawed," Appellant does not specifically challenge the district court's analysis, and we will not construe Appellant's argument as such.

III.

Based on the reasons stated above, we AFFIRM the district court's order denying Appellant's motion to dismiss on Eleventh Amendment grounds.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION DATED MAY 17, 2000 AND FILED MAY 22, 2000

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

Civil Action No. EP-98-CA-114-EP

SOUTHWESTERN BELL TELEPHONE COMPANY,

Plaintiff,

VS.

CITY OF EL PASO and EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1,

Defendant.

ORDER

On this date the Court considered El Paso County Water Improvement District No. 1's Motion for Dismissal Pursuant to Eleventh Amendment, filed December 1, 1999 and Southwestern Bell's Response. El Paso County Water Improvement District No. 1's letter briefs have also been considered. Also on this date, the Court considered Southwestern Bell's Conditional Motion to Substitute Officials of El Paso County Water Improvement District No. 1, as well as the response to that motion. After careful consideration, the Court will deny the motion to dismiss and will deny the conditional motion as moot.

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Background and Procedural History

Southwestern Bell Telephone Company ("SWBT"), a provider of telecommunications services holding a certificate of convenience and necessity issued by the Public Utility Commission of Texas ("PUC"), brought this suit for declaratory and injunctive relief originally against the City of El Paso ("City"). In its original petition, SWBT sought declarations that (1) a proposed city ordinance that would require SWBT to pay the City 5% of all gross revenues from services to customers within El Paso violated the Federal Telecommunications Act of 1996, 47 U.S.C. § 151 et seq., ("FTA"); (2) certain buyout provisions of a then-current ordinance as well as the proposed ordinance also violated the FTA; (3) the proposed ordinance violated the Texas Public Utilities Regulation Act, Title II of the Texas Utilities Code, ("PURA"); (4) the buy-out provisions violated Article 1416 of the Texas Revised Civil Statutes; (5) no SWBT property would be subject to the buyout provisions; and (6.) the buyout provision is unenforceable.

El Paso County Water Improvement District No. 1 ("District") was added as a Defendant in SWBT's First Amended Complaint. The District is a water improvement district operating under Article XVI, Section 59 of the Texas Constitution. At the center of the controversy between SWBT and the District is a series of irrigation ditches deeded from the federal Bureau of Reclamation to the District in January 1996. Development in the area of the ditches has resulted in a number of roads being built crossing ditches and has also resulted in an increase in demand for telephone service.

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The District has established certain application procedures for entities wanting to cross the canals, laterals and ditches. These procedures require an entity, such as SWBT, to complete an application, pay an application fee of $500 and obtain a survey. Before the survey is ordered, the District's Board of Directors must preliminarily approve the application. After the survey is completed, the Board assesses a charge, which can be determined on an ad hoc basis, based on the length of the crossing.

In its claims against the District, SWBT seeks declaratory relief, arguing that (1) the District's application procedures and fees violate both FTA and PURA; (2) roads and highways crossing the District's ditches and canals are public roadways; (3) the District has no right to charge for telephone lines crossing its canals and ditches when those lines are within the rights-of-way of city or county roads; (4) the water flowing through the District's canals and ditches is public; and (5) the District has no right to charge for telephone lines crossing public waters. The District filed a counterclaim, alleging that SWBT has trespassed on its property, or alternatively, that SWBT has taken its property for public use without compensating the District.

SWBT and the City have settled their claims, leaving the District as the only defendant remaining in the case.

Standards for Eleventh Amendment Immunity

The District moves to dismiss this case on the basis that it is barred by the Eleventh Amendment. In the absence of valid Congressional abrogation or state consent, the Eleventh

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Amendment prohibits a plaintiff from suing a state in federal court. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S.Ct. 2219, 2223 (1999).

The District argues that it is a branch of the state and is, therefore, immune from suit. SWBT argues that the District is more like a municipality, county or a school district, none of which are protected by Eleventh Amendment immunity. *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

In *Clark v. Tarrant County*, 798 F.2d 736 (5th Cir. 1986), the Fifth Circuit established a six-factor test for determining whether an entity is a branch of the state for purposes of the Eleventh Amendment. These factors are:

1.) Whether the state statutes and case law view the agency as an arm of the state:

2.) The source of the entity's funding;

3.) The entity's degree of local autonomy;

4.) Whether the entity is concerned primarily with local, as opposed to statewide, problems;

5.) Whether the entity has the authority to sue and be sued in its own name; and

6.) Whether the entity has the right to hold and use property.

Hudson v. City of New Orleans, 174 F.3d 677, 679 (5th Cir. 1999). *See also Clark*, 798 F.2d at 744-45.

However, there is another line of Fifth Circuit case law on this subject to which the District directs the Court's attention. In this line of cases, port authorities, which also operate under Article XVI, Section 59 of the Texas Constitution, are held to be immune arms of the state. *Pillsbury Co., Inc. v. Port of Corpus Christi Auth.*, 66 F.3d 103, 104 (5th Cir. 1995); *Kamani v. Port of Houston Auth.*, 702 F.2d 612 (5th Cir. 1983).

The District argues that, based on these cases, the Fifth Circuit has created a bright-line test for entities organized and operated under Article XVI, Section 59 of the Texas Constitution, and that an examination of the *Clark* factors would be inappropriate. Particularly, the District points to language in *Pillsbury* emphasizing the creation of the port authority pursuant to Article XVI, Section 59 of the Texas Constitution. *Pillsbury*, 66 F.3d at 104-05.

The Court is convinced that the language in *Pillsbury* does not have the broad significance that the District would attribute to it. The basis for the Fifth Circuit's decision in *Pillsbury* is that the Port of Corpus Christi Authority is factually and legally indistinguishable from the Port of Houston Authority, which the court in *Kamani* had previously held immune from suit under the Eleventh Amendment. *Pillsbury*, 66 F.3d at 104. Therefore, *Pillsbury* was essentially decided on the basis of stare decisis.

Kamani, too, was decided on the basis of a previous case, *McCrea v. Harris County Houston Ship Channel Navigation*

Dist., 423 F.2d 605 (5th Cir. 1970). The court in *Kamani*, in holding the Houston port immune from suit, cited *McCrea*'s statement that the Port of Houston Authority was "a creature of state law and a political subdivision of the State of Texas." *Kamani*, 702 F.2d at 613. In *McCrea*, the issue of whether the Houston port was an arm of the state for Eleventh Amendment purposes was never raised; rather, the court was describing the Harris County Houston Ship Channel Navigation District. *McCrea*, 423 F.2d at 607. Therefore, neither *Kamani* nor *McCrea* hold that an entity created and run under Article XVI, Section 59 of the Texas Constitution is automatically protected by the Eleventh Amendment.

Further, the context of the statement in *Pillsbury* indicates that the Fifth Circuit did not intend to create a bright-line test for Eleventh Amendment immunity. The plaintiff in *Pillsbury* had argued that the Supreme Court case *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), overruled *Kamani*. In *Hess*, the Supreme Court held that a bi-state railroad created by an interstate compact was not subject to Eleventh Amendment immunity. *Hess*, 513 U.S. at 38. The *Pillsbury* court distinguished the analysis in *Hess* by stating:

> We view *Hess* as a limited holding addressing the standard to be applied to bi-state entities not created pursuant to state statute. Because the Corpus Port and the Houston Port were both created and still operate pursuant to Article XVI, Section 59 of the Texas Constitution, *Hess* does not overrule *Kamani* or control the disposition of this appeal.

Pillsbury, 66 F.3d at 104-05.

Thus, in context, the court in *Pillsbury* is not indicating that there should be a bright line rule — that everything created pursuant to a particular section in the Texas Constitution is entitled to immunity — but is instead distinguishing the facts before it from the facts before the Supreme Court in *Hess.*[1] Therefore, the Court will examine the six *Clark* factors to determine the status of the District.

The six factors

The six *Clark* factors are not given equal weight, and it is common for several of the factors to weigh in favor of viewing the entity as an arm of the state and for several to weigh against it. *Hudson*, 174 F.3d at 682-83.

The source of the District's funding

Of the six *Clark* factors, the source of the entity's funding has been held to be the most important. *Hudson*, 174 F.3d at 679; *Delahoussaye v. City of New Iberia*, 937 F.2d 144, 147 (5th Cir. 1991). This is essentially a question of whether the state would be liable for a judgment against the entity. *See Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 430 (1997). The Court notes that SWBT is not seeking any monetary damages from the District.

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1. *Cf. Flores v. Cameron County*, 92 F.3d 258, 268 (5th Cir. 1996) ("analogies between like entities cannot replace consideration of the six relevant factors"); *Laje v. R.E. Thomason Gen. Hosp.*, 665 F.2d 724, 727 (5th Cir. 1982) ("[a] federal court must examine the particular entity in question and its powers and characteristics as created by state law to determine whether the suit is in reality a suit against the state itself").

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The District is funded by local user fees (assessments), local taxes and bonds. *See* TEX. WATER CODE § 49.107 (authorizing a district to levy and collect taxes for operation and maintenance); *Id.* at § 55.354 (assessments); *Id.* at § 55.491 (authorizing bond election); *Id.* at § 55.491 (amount of the bonds should be sufficient to pay for proposed improvements); *Id.* at § 55.651 *et seq.* (levying taxes to pay principal and interest on bonds).

More importantly, it appears that the District itself, and not the state, is responsible for any judgments against it. *Harris County Flood Control Dist. v. Mihelich*, 525 S.W.2d 506 (Tex. 1975); Op. Att'y Gen. No. H-1111, 1978 WL 24366 (Jan. 6, 1978) (both stating that a judgment against district operating pursuant to Article XVI, Section 59 of the Texas Constitution should be paid from the district's maintenance fund). See also TEX. WATER CODE § 49.066(b) (a state court rendering judgment against a district may order the district to collect taxes to pay the judgment). Therefore, a judgment against the District would not be paid from the state treasury.

How state law views the District

Although not binding on the Court, whether state law views the entity as an alter ego of the state is relevant to the determination of Eleventh Amendment immunity. The Texas Supreme Court has held that political subdivisions created by the Texas Legislature under article XVI, section 59 of the Texas Constitution are immune from suit in Texas courts. *Guillory v. Port of Houston Auth.*, 845 S.W.2d 812, 812 (Tex. 1993). Although the entity at issue in *Guillory* was a port

authority, the Texas Supreme Court also addressed the immunity of water improvement districts. Specifically, the Texas court stated that "[w]ater improvement districts . . . are different from municipalities in that the former are created by the Legislature for general public purposes, while the latter are created by consent of their inhabitants." *Guillory*, 845 S.W.2d at 814.

The Texas Supreme Court also stated that the Houston Port Authority was immune from federal suit, based on *Kamani*. *Guillory*, 845 S.W.2d at 815. Because the same port authority was involved in both *Kamani* and *Guillory*, these statements do not persuade the Court that the District is immune under the Eleventh Amendment.

The district's degree of local autonomy

The District is run by a Board of Directors consisting of five locally elected directors who own land within the District. TEX. WATER CODE §§ 55.101; 55.102. The Board of Directors is permitted to purchase or make improvements and facilities for irrigation without state approval. *Id.* at § 55.163. Likewise, the District is authorized to enter into contracts with the United States without state approval. *Id.* at § 55.185. The District can also set its own fees, sell its property and annex land. *Id.* at §§ 49.212, 49.226, 49.301-.302. On the other hand, before a district can issue bonds to fund a project, the project must be approved by the Texas Natural Resource Conservation Commission. *Id.* at § 49.181. Nevertheless, on the whole, the District appears to have a significant amount of local autonomy.

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Whether the district is concerned primarily with local, as opposed to statewide, problems

Although the use of water is of concern to the entire state of Texas, the District's powers appear limited to address issues of local concern. The Court notes the Texas Supreme Court's statement that entities created under Article XVI, Section 59 of the Texas Constitution are for "general public purposes." *Guillory*, 845 S.W.2d at 814. Nevertheless, on the whole, it appears that the District is primarily concerned with the area within the District itself. The purposes of a water improvement district are:

> (a) to provide for irrigation of land within its boundaries.
>
> (b) to furnish water for domestic, power, and commercial purposes.
>
> (c) to cooperate with the United States under federal reclamation laws for the purpose of construction, operation and maintenance of irrigation and drainage facilities necessary to maintain the land's irrigability and to assume debts to the United States on account of district lands

See TEX. WATER CODE § 55.161.

These purposes strongly suggest that the District is primarily concerned with local problems.

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Whether the entity has the right to sue and be sued in its own name & whether the entity has the right to hold and use property.

These two factors are frequently considered to be the least important. *See Hudson*, 174 F.3d at 682. A water district is permitted to sue in its own name. *See* TEX. WATER CODE § 49.066(a) (a district, including a water improvement district, may sue and be sued); *Id.* at § 55.504 (before selling bonds, a water improvement district is to bring suit in district court); *City of Pelly v. Harris County Water Control and Improvement Dist. No. 7*, 195 S.W.2d 241 (Tex. Civ. App. — Galveston 1946) (rev'd on other grounds).

Likewise, a water district can acquire property. TEX. WATER CODE § 49.218; *See also Id.* at 49.222 (eminent domain); *El Paso County Water Improvement Dist. No. I v. City of El Paso*, 133 F.Supp. 894, 914 (W.D.Tex. 1995) (the District has "a broad right of eminent domain").

Motion to Substitute Plaintiffs

In light of the Court's decision, it is unnecessary to decide whether SWBT could substitute the District's directors as defendants. The Court notes, however, that *Ex Parte Young* permits suit for prospective declaratory or injunctive relief against a state officer in his or her official capacity. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ex Parte Young*, 209 U.S. 123 (1908). Based on the nature of the suit and the prospective relief sought in this case, the *Ex Parte Young* doctrine would seem applicable. Therefore, if the District were considered an arm of the state for Eleventh

Amendment purposes, the suit would be permitted to go forward by substituting the Directors of the District for the District itself.

Conclusion

ACCORDINGLY, it is ORDERED that El Paso County Water Improvement District No. 1's Motion for Dismissal Pursuant to Eleventh Amendment (Docket No. 49) is DENIED. It is also ORDERED that Southwestern Bell's Conditional Motion to Substitute Officials of El Paso County Water Improvement District No. 1 (Docket No. 55) is DENIED AS MOOT.

s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES DISTRICT
JUDGE

APPENDIX C — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED APRIL 25, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-50485

SOUTHWESTERN BELL TELEPHONE COMPANY

Plaintiff – Appellee

v.

CITY OF EL PASO; ET AL

Defendants

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO 1

Defendant – Appellant

Appeal from the United States District Court for the Western District of Texas, El Paso

ON PETITION FOR REHEARING EN BANC
(Opinion 3/19/01, 5 Cir., __, __ F.3d __)

Appendix C

Before DUHÉ and PARKER, Circuit Judges, and LINDSAY,* District Judge.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

* * *

ENTERED FOR THE COURT

s/ Robert M. Parker
United States Circuit Judge

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* District Judge of the Northern District of Texas, sitting by designation.

Judges King and Jones did not participate in the consideration of the petition for rehearing en banc.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, PECOS DIVISION DISMISSING CASE ON ELEVENTH AMENDMENT GROUNDS IN *YSLETA DEL SUR PUEBLO v. EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1* DATED NOVEMBER 13, 1998 AND FILED NOVEMBER 16, 1998

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

P-98-CA-27

YSLETA DEL SUR PUEBLO

v.

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1

ORDER DISMISSING CASE ON ELEVENTH AMENDMENT GROUNDS

BEFORE THE COURT in the above-captioned cause of action is Plaintiff's Motion for Order on Eleventh Amendment and Other Immunity Issues, filed September 23, 1998, Defendant's Response, filed October 5, 1998, and Plaintiff's Letter Brief in Reply to Defendant's Response, filed October 8, 1998. After due consideration, the Court is of the opinion that Plaintiff's claim should be dismissed for lack of jurisdiction.

Appendix D

Factual and Procedural Background

The Plaintiff, the Ysleta del Sur Pueblo ("Tribe"), a federally recognized Indian tribe, seeks to eject El Paso County Water Improvement District No. 1 ("EPCWID") from property EPCWID possesses in the present day Ysleta and Socorro Grants in El Paso County, Texas and seeks damages resulting from EPCWID's alleged trespass on such property. The Tribe filed its Complaint on March 11, 1998, asserting that the Tribe is rightfully entitled to possess the subject property based on a 1751 Spanish Grant and a prior aboriginal right of possession. The Tribe alleges that neither the Kingdom of Spain, its successor the Republic of Mexico, or the Republic of Texas ever terminated the Tribe's legal title in any of its lands or its aboriginal right to possess its lands. Further, the Tribe claims its legal title and aboriginal rights are protected by the 1848 Treaty of Guadalupe Hidalgo, 9 Stat. 922 and the Trade and Intercourse Act, ch. 33, 1 Stat. 137 ("the Indian Non-Intercourse Act"), as amended. Through various Relinquishment Acts, the state of Texas relinquished the subject properties to the people of the towns of Ysleta and Socorro, respectively.

Defendant El Paso County Water Improvement District No. 1 acts as an agent of the State of Texas in handling individual contracts between water users and the United States and to levy taxes and assessments on lands involved in the Rio Grande Reclamation Project, and was organized in accordance with the general laws of Texas and pursuant to Article XVI, section 59 of the Constitution of the State of Texas. (Defendant's Original Answer ¶¶ 45-47.) EPCWID contends that the Tribe was not a federally recognized Indian

tribe prior to 1968 and that non-Indian land is the subject of this litigation. Consequently, EPCWID denies that the Indian Non-Intercourse Act, federal Indian common law, or the Treaty of Guadalupe Hidalgo apply to this case. EPCWID denies that the Tribe is entitled to possess the subject property, whether under a 1751 Spanish Grant or any alleged prior aboriginal right of possession.

EPCWID claims that it is a political subdivision of the State of Texas and as such possesses sovereign immunity to suit and is immune to the Tribe's claims for damages. It also asserts the affirmative defenses of laches and statute of limitations, and further claims that if the Tribe ever had any aboriginal right of possession to the subject lands, such right was extinguished long ago by the actions of the United States.

Plaintiff's (the Tribe's) Motion requests the Court to affirm its jurisdiction over EPCWID or to dismiss the case based on Eleventh Amendment immunity. The Tribe acknowledges that EPCWID is a political subdivision of the State of Texas, organized and existing pursuant to Article XVI, Section 59 of the Constitution of the State of Texas, but claims it is not an alter-ego agency of the State (Original Complaint ¶5; First Amended Original Complaint ¶5.)

EPCWID urges that this action should be dismissed because, as a political subdivision operating pursuant to Article XVI, Section 59 of the Texas Constitution, it is entitled to sovereign immunity.

Appendix D

Discussion

Is the Water District Entitled to Sovereign Immunity?

EPCWID asserts that the Tribe's claims are barred by the Eleventh Amendment to the United Status Constitution, which provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State. U.S. CONST. amend XI. Thus, a state is constitutionally immune from actions brought in federal courts by its own citizens or citizens of other states, unless it consents to be sued. *Hans v. Louisiana,* 134 U.S. 1, 3, 19 (1890); *Scott v. Board of Supervisors of La. State Univ.*, 336 F.2d 557, 553 (5th Cir. 1964); *Edelman v. Jordan,* 415 U.S. 651, 663 (1974); *Florida Dep't of States v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.17 (1982); *In re State of New York,* 256 U.S. 490, 497 (1921). *See also Aerojet-General Corp. v. Askew,* 453 F.2d 819, 828 (5th Cir. 1971) (setting forth a two-pronged test for the existence of Eleventh Amendment immunity: (1) whether the action is against the state, and (2) if so, whether the state consented to be sued in the federal courts), and *Voism's Oyster House, Inc. v. Guidry,* 799 F.2d 183, 185-86 (5th Cir. 1986) (noting that Eleventh Amendment bars suits in federal court by citizens of a state against their own state or a state agency or department). Sovereign immunity of the Eleventh Amendment restricts suits against states by sovereigns as well as by individuals. *Monaco v. Mississippi,* 292 U.S. 313, 321-22, 330 (1933) (holding that a state, without counting, may not be sued by its own citizens,

foreign corporations, other states, or foreign states). Eleventh Amendment immunity also applies to a suit by an Indian tribe against a state. *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 782 (1991) (recognizing the Indian tribes enjoy immunity against suit by the states and vice versa); *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 117 S.Ct. 2028 (1997) (according Indian tribes the same status as foreign sovereigns and recognizing that sovereign immunity restricts suits by sovereigns against sovereigns). Plaintiff concedes in its pleadings that the Ysleta del Sur Pueblo is a federally recognized Indian tribe. (Original Complaint ¶4; First Amended Original Complaint ¶4). The Tribe and a fortiorari its members are therefore subject to Eleventh Amendment immunity. *Coeur d'Alene Tribe,* 117 S.Ct. at 2033-34.

A State can waive its sovereign immunity and consent to being sued. *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 99 (1984), citing *Clark v. Barnard,* 108 U.S. 436, 447 (1383); *Coeur d'Alene Tribe,* 117 S.Ct. at 2033. The State's consent, however, must be unequivocally expressed. *Pennhurst,* 465 U.S. at 99, citing *Edelman v. Jordan,* 415 U.S. 651, 673 (1974); *Papasan v. Allain,* 478 U.S. 265, 276 n.10 (1986). Absent such waiver, neither a state or agencies acting under its control are subject to suit in federal court. *Sherwinski v. Peterson,* 99 F.3d 849, 851 (5th Cir. 1996), citing *Puerto Rico Aquaduct and Sewer Authority v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 144 (1993).

A clear showing of congressional purpose is required to abrogate Eleventh Amendment immunity, such as enactment of a federal statute that explicitly and on its face indicates an intent to sweep away the immunity of the States or that

has a history which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States. *Quern v. Jordan,* 440 U.S. 332, 343-45 (1979) (holding that 42 U.S.C. § 1983 does not override state's Eleventh Amendment immunity). *See also Pennhurst,* 465 U.S. at 99, quoting *Quern,* 440 U.S. at 342 (requiring an unequivocal expression of congressional intent to "overturn the constitutionally guaranteed immunity of the several States" in the context of civil rights legislation and the Fourteenth Amendment). In deciding whether a state has waived its constitutional protection under the Eleventh Amendment, the Court will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction ." *Edelman,* 415 U.S. at 673, quoting *Murray v. Wilson Distilling Co.,* 213 U.S. 151, 171 (1909).

In *Idaho v. Coeur d'Alene Tribe,* a federally recognized Indian tribe brought suit against the state and its officials and agencies, alleging an ongoing violation of its property rights in contravention of federal law. 521 U.S. 261, 117 S.Ct. 2028, 2040 (1997).[1] Specifically, the Coeur d'Alene

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1. The Coeur d'Alene Tribe requested injunctive relief in *Idaho v. Coeur d'Alene Tribe,* seeking to invoke the *Ex parte Young* exception to the Eleventh Amendment bar. 117 S.Ct. at 2043. In *Ex Parte Young,* the Supreme Court recognized an exception to a state's Eleventh Amendment immunity for certain suits seeking declaratory and injunctive relief against state officers in their individual capacities. 117 S.Ct. at 2030; *Ex Parte Young,* 209 U.S. 123 (1908). While the Supreme Court did find the *Young* doctrine applicable, it allowed claims for declaratory and injunctive relief to

(Cont'd)

Tribe ("CDA Tribe") claimed ownership in the submerged lands and bed of Coeur d'Alene Lake and various of its navigable tributaries and effluents lying within the original boundaries of the Coeur d'Alene Reservation. *Id.* at 2030-32. In the alternative, the CDA Tribe claimed ownership of the submerged lands pursuant to unextinguished aboriginal title. *Id.* at 2032. The Coeur d'Alene Tribe asked the Court to declare that the disputed lands were for the exclusive use, occupancy and enjoyment of the tribe and to invalidate all statutes and regulations purporting to regulate the lands. *Id.* The Court found that the CDA Tribe's suit was the functional equivalent of a quiet title action which implicates special sovereignty interests. *Id.* at 2040. As such, the CDA Tribe could not maintain a quiet title suit against Idaho in federal court, absent the State's consent, because the Eleventh Amendment would bar it. *Id.* Although the relief requested is not as extensive, the nature of suit in the instant case is strikingly similar to that of the *Coeur d'Alene* suit: the Ysleta del Sur Pueblo seeks to establish its rightful title to certain property within the Ysleta and Socorro Grants and to exclude EPCWID from possession. On these facts, the instant suit too is the functional equivalent of a quiet title action, and thus cannot be maintained in federal court without the consent of the State of Texas. *See id.* To hold otherwise would allow the federal court to summon a state before it in a private action seeking to divest the state of a property interest, a power clearly beyond the Court's authority

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(Cont'd)
proceed only insofar as they sought to preclude ongoing violations of federal law. *Id.* Because the Ysleta del Sur Pueblo Tribe did not include state officers as defendants, the *Ex Parte Young* exception has no application in the instant case.

to act. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 699-700 (1932).

The instant case is a property rights suit seeking relief in the form of ejectment and damages resulting from trespass. The federal statutes implicated include the Indian Non- Intercourse Act and any treaties which may have been codified. State statutes at issue include various Relinquishment Acts. Neither party has cited any evidence of Congressional or state legislative intent to abrogate Eleventh Amendment immunity in these particular acts of legislation. Likewise, neither party has established by state statute or otherwise that either the State of Texas or its agent El Paso County Water Improvement District No. 1 consented to be sued. Consequently, the Eleventh Amendment bars the Tribe's claim in federal court against the State of Texas.

Having determined that the Tribe's claim is barred by the Eleventh Amendment if asserted against the State, the question that remains is whether the State of Texas is the real party in interest in this suit brought against EPCWID. The nature of the suit as one against the State is to be determined by the essential nature and effect of the proceeding. *Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459, 464 (1945). The Fifth Circuit Court of Appeals has taken a case-by-case approach to determining whether a State is the real party in interest in suits brought against entities which appear to be alter egos of the State. *Richardson v. Southern Univ.*, 118 F.3d 450 (5th Cir. 1997). "A federal court must examine the particular entity in question and its powers and characteristics as created by state law to determine whether the suit is in reality a suit against

the state itself." *Id.*, citing *Farias v. Bexar County Bd. of Trustees for Mental Health Mental Retardation Servs.*, 925 F.2d 866, 874 (5th Cir.), in turn quoting *Laje v. R.E. Thomason Gen. Hosp.*, 665 F.2d 724, 727 (5th Cir. 1982)), *cert. denied*, 502 U.S. 866 (1991). *See also Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (finding school board was more like county or city than it was like arm of state, and it therefore was not entitled to assert Eleventh Amendment immunity where, under state law, "state" did not include "political subdivisions" and "political subdivisions" did include local school district); *Sessions v. Rusk State Hospital*, 648 F.2d 1066, 1069 (5th Cir. 1981) (concluding that Rusk State Hospital is an arm of the state for Eleventh Amendment purposes because it is a state institution under exclusive control of Texas Department of Mental Health and Mental Retardation). The Fifth Circuit identifies six factors that guide its determination of whether a particular entity is an arm of the State:[2]

(1) whether the state statutes and case law characterize the agency as an arm of the state;

(2) the source or the funds for the entity;

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2. This "test" is identical to the test applied by the Fifth Circuit in diversity jurisdiction case law, to determine whether a governmental body could be considered a "citizen" or alter ego of a state. *Richardson*, 118 F.2d at 452 n.8, citing *PYCA Indus., Inc. v. Harrison County Waste Management Dist.*, 81 F.3d 1412, 1416 n.2 (5th Cir. 1996) (" '[T]he analysis of an [entity's] status is virtually identical whether the case involves determination of immunity under the Eleventh Amendment or a determination of citizenship for diversity purposes.' " (quoting *Tradigrain, Inc. v. Mississippi State Port Auth.*, 701 F.2d 1131, 1132 (5th Cir. 1983)).

(3) the degree of local autonomy the entity enjoys;

(4) whether the entity is concerned primarily with local, as opposed to state-wide problems;

(5) whether the entity has authority to sue and be sued in its own name; and

(6) whether the entity has the right to hold and use property.

Delahoussaye v. City of New Iberia, 93 7 F.2d 144, 147 (5th Cir. 1991), citing *Minton v. St. Bernard Parish School Bd.,* 803 F.2d 129, 131 (5th Cir. 1986) (footnote omitted) (quoting *Clark v. Tarrant County,* 798 F.2d 736, 744 (5th Cir. 1986)). Applying this test in *Delahoussaye*, a state university was determined to be an arm of the State and thus entitled to Eleventh Amendment immunity. *Delahoussaye,* 937 F.2d at 147. Similarly in *Richardson,* a state university and its board of supervisors were entitled to sovereign immunity in an action by a student, as the state was the real party in interest. *Richardson,* 118 F.3d at 456. In applying the *Delahoussaye* factors to the Greater New Orleans Express Commission ("GNOEC"), however, the Court concluded that the GNOEC was not an arm of the state and, therefore, was not shielded by the state's Eleventh Amendment immunity. *Pendergrass v. Greater New Orleans Express Comm'n,* 144 F.3d 342, 343 (5th Cir. 1998). *See also McDonald v. Board of Miss. Levee Comm'rs,* 832 F.2d 901 (5th Cir. 1987) (finding that Board of Mississippi Land Commissioners was not arm of state and was not entitled to Eleventh Amendment immunity, even though its existence was mandated by State Constitution).

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The fact that EPCWID may be cloaked with some indicia of state power may not be sufficient to immunize it from suit in federal court. The United States Supreme Court has consistently refused to construe the Eleventh Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.' *Lake Country Estates v. Tahoe Reg'l Planning Agency,* 440 U.S. 391, 400-01 (1979). A county does not occupy the same position as a state for purposes of the Eleventh Amendment; a county defendant is not necessarily a state defendant for purposes of the Eleventh Amendment. *Edelman,* 415 U.S. at 667 n.12 (1974). In examining EPCWID to determine whether the suit is in reality a suit against the state itself, EPCWID may nevertheless qualify for sovereign immunity if the state is a necessary party to the suit. *Jacintoport Corp. v. Greater Baton Rouge Port Comm'n,* 762 F.2d 435, 438 (5th Cir. 1985).

Jacintoport predates *Delahoussaye* and *Clark* (on which *Delahoussaye* is based), and sets forth the Fifth Circuit's multi-factor test to determine immunity under the Eleventh Amendment. *Id.* at 438-40, 442. *Clark* adopts the *Jacintoport* factors. The *Delahoussaye* factors are essentially identical to the *Jacintoport* factors, although *Delahoussaye* does not directly cite *Jacintoport*. In *Jacintoport,* the factor that "subsumes all others" is the treatment of the entity in state courts. *Id.* at 438, citing *Huber, Hunt & Nichols v. Architectural Stone Co.,* 625 F.2d 22, 25 (1980). Other factors comprising the Fifth Circuit's test for Eleventh Amendment immunity in *Jacintoport* include:

(1) financial independence, that is, whether the judgment will be satisfied by the entity's funds or by state appropriations, and other aspects of financial autonomy, such as the extent of the state's liability for the entity's general debts and obligations (as opposed to liability for a judgment);

(2) the entity's degree of local autonomy and control, and most importantly, whether the funds to defray any award would be derived from the state treasury, including an analysis of the extent of the entity's independent management authority;

(3) whether the agency has express authority to sue and be sued in its corporate name;

(4) whether the agency has been granted the right to hold and use property; and

(5) whether the agency is primarily concerned with local, as opposed to statewide, problems.

Jacintoport, 762 F.2d at 438-40, 442 (citations omitted). In a typical situation, some of these factors will point to immunity, while others will just as strongly suggest that the entity is an independent political subdivision not entitled to immunity. *Id.* at 442, citing *Tradigrain,* 701 F.2d at 1133. The Court "must never, however, lose sight of the primary question involved: whether the state is the real party in interest in the lawsuit nominally brought against the agency". *Id.*

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Several years after the *Jacintoport* decision and without considering factors similar to those in *Jacintoport,* the Texas Supreme Court reached the conclusion that the Port of Houston Authority is a political subdivision of the State that is protected by governmental immunity except to the extent that it has been waived. *Guillory v. Port of Houston Auth.*, 845 S.W.2d 812, 813 (Texas 1993). The *Guillory* court reasoned that governmental units created under article XVI, section 59 of the Texas Constitution are entirely governmental in function. *Id.* at 814. The Court affirmed the Texas Court of Appeals' holding that a navigation district like the Port Authority is such a political subdivision, which can act only in a governmental capacity and not in a proprietary capacity. *Id.* at 813. The *Guillory* Court further stated that "[w]ater improvement districts . . . created under [article XVI, section 59] are created by the Legislature for general public purposes" and that immunity is applied on the basis of creation of the governmental unit. *Id.* at 814. This decision was consistent with the Fifth Circuit's ruling in *Kamani v. Port of Houston Auth.*, 702 F.2d 612, 613 (5th Cir. 1983), which classified the Port of Houston Authority as "a creature of state law and a political subdivision of the State of Texas," entitling it to Eleventh Amendment sovereign immunity from a maritime tort claim.

Nine years after the Fifth Circuit's *Jacintoport* decision, the United States Supreme Court declined to find the Port Authority Trans-Hudson ("PATH") entitled to Eleventh Amendment immunity in a suit by injured railroad workers against PATH, seeking recovery under Federal Employers' Liability Act (FELA). *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 50 (1994). The Court first determined

that there was no genuine threat to the dignity of New York or New Jersey in allowing the workers to pursue FELA claims in federal court. It then focused on determining whether there was good reason to believe the states and Congress designed the Port Authority to enjoy Eleventh Amendment immunity. *Id.* at 46. The Court recognized that the impetus for the Eleventh Amendment is the prevention of federal court judgments that must be paid out of a State's treasury. *Id.* The Court went on to state that the proper focus of an Eleventh Amendment inquiry is on losses and debts. *Id.* at 51. If the State is not obligated to bear and pay the resulting indebtedness of the enterprise when expenditures of the enterprise exceed receipts, then the Eleventh Amendment's core concern is not implicated. *Id.*

One year after *Hess* was decided, the Fifth Circuit reverted again to its *Kamani* analysis, finding the Port of Corpus Christi Authority legally and factually indistinguishable from the Port Authority of Houston ("a creature of state law and a political subdivision of the State of Texas" entitled to Eleventh Amendment immunity). *Pillsbury Co. v. Port of Corpus Christi Auth.*, 66 F.3d 103, 104 (5th Cir. 1995). The Court reasoned that, because the Corpus Port and the Houston Port were both created and still operate pursuant to Article XVI, Section 59 of the Texas Constitution, *Hess* did not overrule *Kamani* or control the disposition of the case. *Id.*

Fortunately, the Fifth Circuit's apparent "bright-line" test established in *Pillsbury* makes it unnecessary for this Court to engage in either the *Delahoussaye / Jacintoport* or the *Hess* analyses to determine whether EPCWID is an entity whose nexus with the state entities it to assert sovereign

immunity. As helpfully referenced in EPCWID's Response, the history and nature of EPCWID are summarized as follows:

> The plaintiff District was established in 1917 under the authority of a Texas Statute. Later it was converted into a conservation and reclamation district under the Constitution of Texas, Vernon's Ann. St. Const. Tex. art. 16, [section] 59, but without any change of name. Under the statute it has a broad right of eminent domain 'and the authority hereby conferred shall authorize and empower such districts to condemn all lands, private and public, for the purpose herein indicated, beyond the boundary of such districts and in any county within the State of Texas', and it also has the power of taxation. In fact, such districts and various other similar districts are not classed with municipal corporations, but are held to be political subdivisions of the State, performing governmental functions, and standing upon the same footing as counties and other political subdivisions established by law.
>
> It is not only an arm of the State, but is fashioned to perform public service and duties of high importance in the welfare of the people of Texas.

El Paso County Water Improvement District No. 1 v. City of El Paso, 133 F. Supp. 894, 914 (D.C. 1955), *reformed in part on other grounds and aff'd in part,* 243 F.2d 917, *cert. denied,* 355 U.S. 820 (1957). As earlier stated, Plaintiff

(the Tribe) acknowledges in its Amended (and Original) Complaint that EPCWID is a political subdivision of the State of Texas, organized and existing pursuant to Article XVI, Section 59 of the Texas State Constitution. The Court will therefore apply the *Kamani/Guillory/Pillsbury* approach regarding entities created under Article XVI, section 59 of the Constitution of the State of Texas in this case. Thus, EPCWID is entitled to Eleventh Amendment immunity by virtue of how it was created and is operated.

Eleventh Amendment sovereign immunity deprives a federal court of jurisdiction to hear a suit against a state. *Warnock v. Pecos County, Tex.*, 88 F.3d 341 (5th Cir. 1996), citing *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). Because this Court has no jurisdiction to decide the Tribe's claim, it must be dismissed.

Finding *Pillsbury* wholly dispositive, the Court declines to reach the issue of whether either the *Hess* analysis or the six-factor balancing test set forth in *Jacintoport* and *Delahoussaye* results in a finding of sovereign immunity.

Conclusion

Because El Paso County Water Improvement District No. 1 was created and still operates pursuant to Article XVI, Section 59 of the Texas Constitution, it is entitled to sovereign immunity under the Eleventh Amendment. Therefore, this action should properly be dismissed because this Court lacks jurisdiction to entertain the Ysleta del Sur Pueblo's claim. Accordingly,

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IT IS ORDERED that Plaintiffs' Complaint be **DISMISSED** for lack of jurisdiction. Costs are assessed against Plaintiff.

All other pending motions are **DENIED AS MOOT**.

SIGNED this 13 day of November, 1998.

s/ Lucius D. Bunton
LUCIUS D. BUNTON, III
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX E — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN *YSLETA DEL SUR PUEBLO v. EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1* DATED APRIL 10, 2000

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-51203
Summary Calendar

YSLETA DEL SUR PUEBLO,

Plaintiff-Appellant,

v.

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1,

Defendant-Appellee.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Not Party.

April 10, 2000.

* * *

Appeal from the United States District Court for the Western District of Texas.

Appendix E

Before POLITZ, WIENER and STEWART, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant The Ysleta Del Sur Pueblo ("Pueblo") appeals the district court's dismissal of its complaint against the El Paso County Water Improvement District No. 1 ("District") for lack of jurisdiction. The Pueblo argues that 1) the district court erred in determining that the District is the alter ego of the State of Texas and therefore immune to suit pursuant to the Eleventh Amendment, 2) Congress abrogated the State's Eleventh Amendment immunity in the Indian Non-Intercourse Act, 25 U.S.C. § 177, and 3) the State, by transacting in the Pueblo's lands, constructively waived Eleventh Amendment immunity by engaging in an activity regulated by Congress. Southwestern Bell Telephone Company ("Southwestern Bell") has filed a motion for leave to file an amicus brief out of time, which the District opposes.

We find that Southwestern Bell's motion is untimely, that the issue Southwestern Bell seeks to address has been adequately briefed by the Pueblo and the District, and that granting Southwestern Bell's motion would result in the needless delay of this case's disposition. *See* Fed. R. App. P. 29. Accordingly, Southwestern Bell's motion is denied.

We have reviewed the record and briefs submitted by the parties and find that the Pueblo's arguments lack merit. *See College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 119 S.Ct. 2219, 2226, 144 L.Ed.2d 605 (1999); *Ysleta Del Sur Pueblo v. Laney,*

199 F.3d 281, 286-88 (5th Cir.2000); *Pillsbury Co., Inc. v. Port of Corpus Christi Authority,* 66 F.3d 103, 104 (5th Cir.1995); *Kamani v. Port of Houston Authority,* 702 F.2d 612, 613 (5th Cir.1983).

AFFIRMED.